



This document is scheduled to be published in the Federal Register on 06/19/2014 and available online at <http://federalregister.gov/a/2014-14114>, and on FDsys.gov

BILLING CODE: 7515-01U

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1250

[FDMS No. NARA-14-0003; Agency No. NARA-2014-037]

RIN 3095-AB73

NARA Records Subject to FOIA

AGENCY: National Archives and Records Administration

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: NARA proposes to revise its regulation governing Freedom of Information Act (FOIA) access to NARA's archival holdings and NARA's own operational records. On August 5, 2013, NARA published a proposed rule in the Federal Register for a 60-day comment period. The public comment period closed on October 4, 2013. NARA received four sets of comments on the proposed rule. In the course of reviewing the proposed rule and addressing those comments, NARA proposed to make additional substantive revisions beyond those addressed in the comments and any administrative or plain language changes. Therefore, NARA is publishing those new substantive revisions for a second round of public comment. The revisions from both rounds of comments, and the comments received, will be compiled and addressed together when NARA publishes the final regulation.

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3095-AB73, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for

submitting comments.

- E-mail: kimberly.keravuori@nara.gov. Include RIN 3095-AB73 in the subject line of the message.

- Fax: 301-837-0319.

- Mail: (For paper, disk, or CD-ROM submissions. Include RIN 3095-AB73 on the submission) Regulations Comments Desk, Strategy Division (SP); Suite 4100; National and Archives Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001

- Hand delivery or courier: Deliver comments to 8601 Adelphi Road; College Park, MD.

Instructions: All submissions received must include the agency name and Regulatory Information Number (RIN) for this rulemaking (RIN 3095-AB73). All comments received may be published without changes, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, by telephone at 301-837-3151, by e-mail to kimberly.keravuori@nara.gov, or by mail to Kimberly Keravuori, Regulations Program Manager; Strategy Division (SP), Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.

SUPPLEMENTARY INFORMATION: On August 5, 2013, NARA published a proposed rule in the Federal Register (78 FR 47245) for a 60-day comment period. This proposed rule clarified which records are subject to the FOIA, NARA's authority to grant access, and made adjustments to NARA's FOIA procedures to incorporate changes resulting from the OPEN FOIA Act of 2009, the OPEN Government Act of 2007, and the Electronic Freedom of Information Act Amendments of 1996 (EFOIA).

The public comment period closed on October 4, 2013. NARA received four sets of comments on the proposed rule, three from individuals and one from the Center for Effectiveness

in Government. NARA appreciates the thoughtfulness and detail reflected in the comments it received. We have reviewed all of the submitted comments, considered carefully the suggestions for revision, and made certain changes on the basis of these comments, adopting most of them in some form. During the course of revising the proposed regulation in response to comments, NARA determined that additional changes were needed to better clarify certain sections and to incorporate standard language from the Department of Justice for consistency. NARA has included those proposed changes here for public review and any additional comments.

Regulatory analysis

This proposed rule is not a significant regulatory action for the purposes of Executive Order 12866 and has been reviewed by the Office of Management and Budget (OMB). The proposed amendment is also not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking. As required by the Regulatory Flexibility Act, it is hereby certified that this proposed rule will not have a significant impact on a substantial number of small entities because this regulation will affect only people and organizations who file FOIA requests with NARA. This proposed rule does not have any federalism implications.

List of Subjects in 36 CFR part 1250

Administrative practice and procedure, Archives and records, Confidential business information, Freedom of information, Information, Records, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the National Archives and Records Administration proposes to further amend 36 CFR part 1250 from the proposed rule text published in the Federal Register (78 FR 47245, Aug 5, 2013) as follows:

PART 1250--- NARA RECORDS SUBJECT TO FOIA

1. The authority citation for part 1250 remains as follows:

Authority: 44 U.S.C. 2104(a) and 2204 (3)(c)(1); 5 U.S.C. 552; E.O. 13526, 75 FR 707 and 75 FR 1013, 3 CFR, 2009 Comp., p. 298-327; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

§ 1250.3 [Amended]

2. Amend § 1250.3 by:
 - a. Removing paragraphs (k) and (l);
 - b. Redesignating paragraphs (m) through (r) as paragraphs (k) through (p);
 - c. Redesignating paragraphs (s) through (u) as paragraphs (r) through (t);
 - d. Adding a new paragraph (q); and
 - e. Revising newly designated paragraph (r).

The addition and revision read as follows:

§ 1250.3 Definitions.

* * * * *

(q) *Representative of the news media* means a person or entity organized and operated to publish or broadcast news to the public, and that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals, including print and online publications, that disseminate news and make their products available through a variety of means to the general public. NARA considers requests for records that support the news-dissemination function of the requester to be a non-commercial use. NARA considers “freelance” journalists who demonstrate a solid basis for expecting

publication through a news media entity as working for that entity. A publishing contract provides the clearest evidence that a journalist expects publication; however, NARA also considers a requester's past publication record. NARA decides whether to grant a requester media status on a case-by-case basis, based on the requester's intended use.

(r) *Review* means examining documents responsive to a request to determine whether any portions of them are exempt from disclosure. Review time includes processing any record for disclosure (*i.e.*, doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions.

* * * * *

3. Amend §1250.20 as follows:

- a. Add a semi-colon and the word "and" to the end of paragraph (a)(3);
- b. Add paragraph (a)(4);
- c. Redesignate paragraphs (c) and (d) as paragraphs (d) and (e); and
- d. Adding paragraph (c).

The addition and revision read as follows:

§1250.20 What do I include in my FOIA request?

* * * * *

(a) * * *

(4) Author, recipient, case number, file designation, or reference number.

* * * * *

(c) Requesters who request records about themselves must do so in accordance with the Privacy Act and our implementing regulations at 36 CFR part 1202. This includes requirements to verify identity set forth in 36 CFR 1202.40. Requesters who request records about someone other than

themselves may receive greater access if they submit either a notarized certification of identity signed by the other person, or proof that the other person is deceased (*e.g.*, a copy of a death certificate or an obituary). As an exercise of its administrative discretion, NARA may require a requester to supply additional information if necessary to verify that a particular individual has consented to disclosure.

* * * * *

4. Amend §1250.28 by:
 - a. Removing the word “or” at the end of paragraph (a)(2);
 - b. Removing the period at the end of paragraph (a)(3) and in its place “; or”; and
 - c. Adding paragraph (a)(4).

The addition reads as follows:

§ 1250.28 How do I request expedited processing?

(a) * * *

(4) A matter of widespread and exceptional media interest in which there exist possible questions that affect public confidence in the Government’s integrity.

* * * * *

5. Amend §1250.30 by revising paragraph (c) introductory text and adding paragraph (e) to read as follows:

§ 1250.30 How will NARA respond to my request?

* * * * *

(c) NARA may withhold records in full or in part if any of the nine FOIA exemptions apply. NARA withholds information only where disclosure is prohibited by law (such as information that remains classified, or information that is specifically exempt by statute) or where NARA

reasonably foresees that disclosure would cause harm to an interest protected by one of the FOIA exemptions. If NARA must withhold part of a record, NARA provides access to the rest of the information in the record. On the released portion of the record, NARA indicates the amount of information it redacted and the exemption it applied, unless including that indication would harm an interest the exemption protects. NARA may also determine that a request does not reasonably describe the records sought; the information requested is not a record subject to FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Information that may be exempt from disclosure under the FOIA is:

* * * * *

(e) NARA may not withhold Presidential records subject to FOIA under 5 U.S.C. 552(b)(5) as defined in the table under paragraph (c) of this section. However, NARA may withhold Presidential records under the remaining FOIA exemptions. In addition, Presidential records may be withheld under the six PRA restrictions for a period of 12 years from when a President leaves office, in accordance with 44 U.S.C. 2204 and 36 CFR part 1270. Representatives of the current and former Presidents may also review Presidential records, and may assert constitutionally-based privileges that would prevent NARA from releasing some or all of the information requested.

6. Amend §1250.50 by revising paragraph (c)(1) to read as follows:

§ 1250.50 General information on fees.

* * * * *

(c) * * *

(1) If you have failed to pay FOIA fees in the past, we will require you to pay your past-due bill

and we may also require that you pay the anticipated fee before we begin processing your request. If we estimate that your fees may be greater than \$250, we may also require advance payment or a deposit before we begin processing your request. If you fail to make an advance payment within 60 calendar days after the date of NARA's fee letter, NARA will close the request.

* * * * *

7. Amend §1250.52 by revising paragraph (b) to read as follows:

§ 1250.52 FOIA fee schedule for operational records.

* * * * *

(b) *Review fees.* (1) NARA charges review fees for time we spend examining documents that are responsive to a request to determine whether we must apply any FOIA exemptions to withhold information. NARA charges review fees even if we ultimately are unable to disclose a record.

(2) The review fee is \$33 per hour (or fraction thereof).

(3) NARA does not charge review fees for time we spend resolving general legal or policy issues regarding the application of exemptions. However, NARA does charge review fees for time we spend obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter.

* * * * *

8. Amend §1250.56 by revising paragraphs (b)(2) and (4) and (d) and adding paragraph (e) to read as follows:

§ 1250.56 How may I request a fee waiver for operational records?

* * * * *

(b) * * *

(2) How the release will reveal meaningful information that the public does not already know about Federal Government activities. Disclosing information that is already in the public domain, in either the same or a substantially-identical form, does not add anything new to the public's understanding of Government activities.

* * * * *

(4) Your expertise or understanding of the requested records as well as your ability and intention to effectively convey information to the public. NARA ordinarily presumes that a representative of the news media satisfies this consideration.

* * * * *

(d) Requesters should ask for waiver or reduction of fees when they first submit their requests to NARA, and should address the criteria referenced above. A requester may ask for a fee waiver at a later time while the underlying record request is still pending or during an administrative appeal.

(e) NARA may also waive (either partially or in full) or reduce fees for operational records in additional circumstances as a matter of administrative discretion.

§ 1250.74 [Amended]

9. Amend §1250.74(a) by removing the phrase “, and your right to judicial review of the decision if information is denied under a FOIA exemption”.

10. Amend §1250.82 as follows:

- a. Redesignate paragraphs (b) through (g) as paragraphs (c) through (h); and
- b. Revise paragraph (a);
- c. Add a new paragraph (b); and

- d. Revise newly redesignated paragraphs (f) and (h).

The revisions and addition read as follows :

§ 1250.82 How does NARA process FOIA requests for confidential commercial information?

* * * * *

(a) If the records are less than 10 years old, NARA reviews the records in response to a FOIA request. If NARA then believes that it should release the records under FOIA, it makes reasonable efforts to inform the submitter. The notice to the submitter describes the business information requested or includes copies of the requested records. NARA does not notify the submitter when it determines that:

- (1) It must withhold the information under FOIA's exemptions;
- (2) The information has been published or made available to the public; or
- (3) It is required by a statute (other than the FOIA), or by a regulation issued in accordance with the requirements of Executive Order 12600, to disclose the information.

(b) If the records are 10 or more years old, NARA reviews the records in response to a FOIA request as it would any other records, and at its discretion, informs the submitter. NARA releases the records if it determines that neither Exemption 4 nor any other exemption applies.

* * * * *

(f) NARA reviews and considers all objections to release that it receives within the time limit. Any information provided by a submitter under this provision may itself be subject to disclosure under FOIA. NARA considers a submitter who fails to respond within the time period specified in the notice to have no objection to disclosure of the information. If NARA decides to release the records, it informs the submitter in writing, along with NARA's reasons for deciding to

release. NARA includes with the notice copies of the records as it intends to release them.

NARA also informs the submitter that it intends to release the records within a reasonable time after the date of the notice unless a U.S. District Court forbids disclosure. NARA will not consider any information it receives after the date of a disclosure decision.

* * * * *

(h) NARA notifies the requester in three circumstances:

- (1) When it notifies the submitter of the opportunity to object to disclosure, or to extend the time for objecting;
- (2) When it notifies the submitter of its intent to disclose the requested information; and
- (3) When a submitter files a lawsuit to prevent the disclosure of the information.

Dated: June 10, 2014.

David S. Ferriero,

Archivist of the United States.

[FR Doc. 2014-14114 Filed 06/18/2014 at 8:45 am; Publication Date: 06/19/2014]